Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MARGARET F. JENSVOLD, M.D.,

Petitioner

v.

DONNA SHALALA, SECRETARY,
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent

**Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit**

PETITION FOR A WRIT OF CERTIERORAI

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59 pp

QUESTIONS PRESENTED

Biases for one party and against another may be conveyed by the judge at the time of trial in the form of gestures, tone of voice, and body language. A judge's biases very clearly conveyed to participants in and observers of the trial at the time of trial via gestures and demeanor, may not be reflected in the trial transcript (Anderson v Sheppard 856 F.2d 741 (6th Cir 1988), page 746). The Federal Rules of Appellate Procedure, Local Rules of the Fourth Circuit specify that due recourse for parties concerned about judicial bias in a particular case is to raise the issue of judicial bias in the appeal of the particular case. In the case of judicial bias conveyed blatantly via demeanor, body language and tone of voice, what is the proper way to introduce the *evidence* of this bias into the appeal for consideration by the appeal's court? The Supreme Court in Liteky v United States 127 L.Ed.2d 474 (1994) set standards for determining judicial bias, but did not discuss these matters, and further clarification is needed.

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IN THE

SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished. It is reported at Jensvold v. Shalala, 141 F.3d 1158 (Table, Text in WESTLAW), Unpublished Disposition, 1998 WL 141156 (4th Cir. (Md.), Mar 30, 1998)(NO. 96-1964).

The opinion of the United States district court judge appears at Appendix B to the petition and is unpublished.

The opinion of the United States district court jury appears at Appendix C to the petition and is unpublished.

The final summary judgment ruling of the United States district court appears at Appendix D and is published.

JURISDICTION

The date on which the United States Court of Appeals decided my case was March 30, 1998.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 27, 1998, and a copy of the order denying rehearing appears at Appendix F.

An extension of time to file the petition for a writ of certiorari was granted to and including September 23, 1998 on July 21, 1998 in Application No. A-61.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. S 455(a) says a judge shall disqualify himself "in any proceeding in which his impartiality might reasonably be questioned."

STATEMENT OF THE CASE

The Fourth Circuit Court of Appeals struck the Appellant's Appendix, including affidavits about the trial judge's behavior and demeanor at trial, from Appellant Margaret Jensvold's appeal. The Appeals Court then, having excluded from consideration key evidence of judicial bias which could not be entered into the appeal in any other manner, ruled against Appellant on her argument that true judical bias by the district court judge occurred at the trial court level and had deprived Plaintiff of a fair trial by an impartial judge. Appellant now petitions the Supreme Court for a Writ of Certiorari regarding issues of standards and criteria for determining whether true judicial bias occurred at the trial court level and standards of proof.

In 1987 Margaret Jensvold had completed medical school, internship, and two years of psychiatric residency when she commenced a fellowship at the National Institute of Mental Health (NIMH), National Institutes of Health (NIH), Bethesda, Maryland. She had won numerous academic and clinical awards, including being named one of the top six psychiatric residents in the United States by the Association for Academic Psychiatry before she started at NIMH.

Dr. Jensvold's scientific mentor, to whom she reported directly and under whose direct supervision she worked, was David Rubinow, MD, clinical director of NIMH, and head of the Menstrually Related Mood Disorder Program.

Dr. Jensvold's first year of fellowship at NIMH also was as her final year of psychiatric residency training. Subsequent years of the fellowship were to serve as post-residency psychiatric fellowship training, during which she would complete and publish research project(s), commencing an academic research career, as is the typical career path and aspiration of NIMH fellows, and to which Dr. Jensvold aspired. Dr. Jensvold was a fellow at NIMH from July 1987 to July 1989. She was not renewed for a third or subsequent years of fellowship. *All* of the other 15 fellows who started at NIMH the same year as Dr. Jensvold were offered third years of fellowship, and in many cases subsequent additional years. The other fellows in Dr. Rubinow's unit around the same time Dr. Jensvold was there (all male) have stayed at NIMH an average of more than 8 years so far.

Dr. Jensvold filed a sex discrimination Equal Employment Opportunity (EEO) complaint in November 1988, and a retaliation EEO complaint in July 1989, based on the actions of Dr. Rubinow and Dr. Peter Schmidt, the fellow a year ahead of Dr. Jensvold in Dr. Rubinow's unit. The EEO never commenced an investigation of either EEO complaint, despite the EEO's mandate to investigate EEO complaints in a timely manner. In December 1990 Dr. Jensvold filed a Title VII sex discrimination and retaliation law suit. Defendant filed for summary judgement and then, failing to prevail in that, petitioned for summary judgement a second time. Judge Benson Everett Legg, in his final summary judgement ruling, in August 1993, made a precedent setting ruling regarding mentoring and the discrimination law.

Judge Benson Everitt Legg was replaced by Judge Deborah K. Chasanow on the case in fall 1993, when Judge Chasanow was appointed to the federal bench.

The case went to trial from February 28, 1994 to April 1, 1994. Because the U.S. Supreme Court had already heard arguments in the case which would determine whether the Civil Rights Act of 1991 was retroactive, but the Supreme Court had not yet ruled on retroactivity at the time of the trial of Jensvold v. Shalala, a jury was empaneled. On April 1, 1994 a unanimous jury of eight Maryland citizens ruled that Plaintiff Margaret Jensvold was both discriminated against and retaliated against by Defendant. The jury awarded Plaintiff $1, however the jury had no choice but to award Plaintiff $1 because of a combination of two rulings by Judge Chasanow: Judge Chasanow ruled at the beginning of the trial that no financial information would be allowed into the trial, and at the end of the trial she instructed the jury that if they could not determine that the Plaintiff had been harmed financially, then they had to award $1. Judge Chasanow set it up so that the jury had no choice but to award $1

On April 26, 1994 the U.S. Supreme Court ruled that the Civil Rights Act of 1991 is not retroactive. Consequently, the jury's ruling in Jensvold v. Shalala became an advisory ruling, and Judge Chasanow became authorized to rule in the case.

On March 30, 1996 Judge Chasanow issued a ruling against Dr. Jensvold, overruling the jury which found both discrimination and retaliation. The judge's brief was so scathing that the Defendant's attorneys have gone after Dr. Jensvold to pay Defendant's costs, a step almost unmost unheard of in 3

employment discrimination cases, especially in a case in which a unanimous jury found in Plaintiff's favor, finding both discrimination and retaliation.

Plaintiff filed an appeal to the Fourth Circuit, arguing a number of points, including undue bias by the district court judge, Judge Chasanow, which harmed the case. Affidavits about Judge Chasanow's clearly biased behavior at trial were sworn to under oath and submitted by a number of participants in and observers of the trial, and included in Plaintiff's appeal.

Even a juror, a person with no vested interest in the case, contacted Dr. Jensvold on her own to express her concerns about Judge Chasanow's clearly biased and non-judicial demeanor, which she and the other jurors noted, discussed, and speculated about but felt they never found a good reason for it. It was clear to this juror and others present at the trial that Judge Chasanow's marked antagonism toward Plaintiff and Plaintiff's lawyers would make it impossible for Judge Chasanow to issue a fair ruling or to rule in Plaintiff's favor.

There was substantial evidence in the form of sworn affidavits by those who witnessed the Judge's conduct during the trial, that the judge stuck out her tongue and made other gestures of prejudice and contempt, conveying antagonism toward Plaintiff, throughout the trial. This is a partial quotation of the affidavits:

a. Sworn AFFIDAVIT OF **Priscilla A. Wilson** (juror).

Priscilla A. Wilson swore under oath and penalty of perjury (Appendix pp 4-8):

> I served as a juror in the case of Jensvold v. Shalala from February 28, 1994 to April 1, 1994. I attended the entire trial.
>
> After the trial I meant to call Dr. Jensvold to express my concerns about the way her case had been handled in court. About a year after the trial, I still felt badly about what I had witnessed, and therefore, in the summer of 1995, and completely on my own initiative, I followed through on my original impulse to call her.
>
> . . . I called her because although she had won the case, I was shocked by the way the judge had behaved during the trial. . .

Dr. Jensvold told me that because of a Supreme Court decision regarding cases filed before the 1991 Civil Rights Act was passed, the jury's finding of discrimination might be disregarded by the judge. After Dr. Jensvold told me this, I had no doubt in my mind that Judge Chasanow would rule against her. I had seen the open hostility the judge had displayed toward Dr. Jensvold and her attorneys throughout the trial. From what I observed, I did not believe there was any possibility Dr. Jensvold could win her case in front of this particular judge.

Toward the beginning of the trial, Judge Chasanow's hostility toward the plaintiff, Margaret Jensvold, and her lawyers, became obvious and became a topic of discussion among the jurors. Although we did not discuss the case, various jurors would comment about the prejudicial way the judge was acting. I didn't take it that seriously at first, because it was my understanding that the jury would decide the case. Nevertheless, I thought the judge's behavior was strange and unprofessional. I did not think judges were supposed to pick sides at the beginning and show favortism. Even if she had already made up her mind about who was right and who was wrong, it seemed to me that it was unprofessional of her not to make more of an effort to be impartial. I did not think that we, as jurors, should have known how she felt. There was no mistaking whose side she was on. Her demeanor was such that even when her words sounded reasonable, her facial expressions and tone of voice communicated her true feelings.

First, there was a clear difference in the way the judge treated the two sets of lawyers. I and the other jurors observed and commented on Judge Chasanow's unmistakable favortism toward the government's lawyers and her unmistakable hostility toward Dr. Jensvold's lawyers. The judge customarily addressed Dr. Jensvold's lawyers in an irritated, sarcastic and patronizing tone of voice. When they attempted to say something, the judge was always chastising them, scolding them. She was constantly badgering Dr. Jensvold's lawyers, constantly, non-stop. It did not seem to me that Dr. Jensvold's lawyers did anything to provoke the abuse they got from the judge. They seemed reasonable and to be doing their best to be respectful toward the judge and to placate her.

The government's lawyers, on the other hand, seemed to me to behave very badly. In my opinion, their demeanor was as 3

unprofessional as that of the judge, if not more so. The government's lawyers were rude and arrogant and childish. Some of the things they did seemed underhanded, and they were aggressive to the point of being sometimes downright vicious. Yet the judge did not call them on their inappropriate behavior or bicker with them at all. The judge used a completely different tone of voice toward them and let them get away with behaving any way they pleased. They would slam books loudly down on the table and go stomping about while the other side was examining witnesses who were giving testimony they didn't like. This seemed to me to be something a judge should not have allowed. Judge Chasanow did not mind at all and even appeared to like the inappropriate and disruptive things they did.

The friendliness of the judge toward the government's lawyers, the indulgence, the casual way they interacted, and the exchanging of smirks and smiles, made it obvious that they all knew each other well and were friends. The judge and the two government lawyers, the three of them, seemed like buddies, in fact. It simply wasn't fair. It was disturbing to me to see a trial in federal court being conducted with this kind of partiality and unfairness.

Apart from Judge Chasanow's differential treatment of the two sets of attorneys, during the testimony of the various witnesses she would shake her head and roll her eyes and employ other facial expressions to a degree that seemed inappropriate and sometimes bizarre. The judge's mugging and body language provided a running commentary for the jury of the judge's opinion of what was being said at any given time. The judge shook her head in disagreement during testimony favorable to Dr. Jensvold and allowed the government's lawyers to cut off such testimony. A few times the judge put her head down on her desk and buried her head in her arms in an expression of exasperation with what was being said. I did not think judges were supposed to behave this way in front of juries.

When testimony unfavorable to Dr. Jensvold was being given, Judge Chasanow would nod in approval. Worse than that, she would smile. . . Judge Chasanow would only smile at the negative things they said. . .

At the end of the trial, the judge gave us specific questions to answer, such as whether Dr. Jensvold was mentored. I believe she was mentored, but she was not mentored properly. I do not understand why we were given such specific questions, rather than simply asked to decide whether Dr. Jensvold was unfairly discriminated against because she is a woman.

My opinion in this case is that she [Margaret Jensvold] was set up to fail. . .

During the jury's deliberations, we had a full discussion about Judge Chasanow's behavior and tried to determine the reason. We couldn't figure it out. I came into the trial as a neutral person. If I came in neutral, why couldn't she? All I know is that when you see a cat who will walk only down one side of the street, you wonder why. Later, when you see a dog on the other side of the street, then you know. I didn't see the dog, but I know there's a dog here somewhere.

b. Sworn AFFIDAVIT OF **Lisa Woods Becker** (trial witness).

Lisa Woods Becker swore under oath and penalty of perjury (Appendix pp 9-10):

. . . While I was on the stand, . . . I had the opportunity of observe the Judge's behavior. I would have expected a judge who was even-tempered and seemed fair to both sides, but that is not at all what I observed. . . Prior to my testifying I had not been told anything about the judge, so the judge's behavior and attitude took me quite by surprise. The judge's attitude was very striking. . . I consider the judge's attitude and behavior to be quite inappropriate for a judge and conveying of undeserved bias against the Plaintiff.

In particular, part of what was very striking to me was the Jekyll and Hyde-type of behavior of the judge. She was so two faced about it, quietly slapping down Plaintiff's counsel when the jury was present, but as soon as the jury left, Mr. Hyde came out. The judge was all smiles to the jury, but as soon as she asked the jury to leave the room and the jury left, the venom spewed. The judge was so incredibly awful to Plaintiff's counsel and so incredibly nice to the other side. The lawyers were trying to talk to the judge, and the judge was being so incredibly mean to Plaintiff's counsel. Plaintiff's

lawyers remained very deferential, consistently being very polite, saying okay, okay and being nice, despite the obviously hostile attitude and behavior of the judge directed selectively at them; meanwhile, Defendant's counsel gloated and rested while the judge defended them.

Even when the jury was present one could tell that the judge favored the defendant's side, but it was when the judge asked the jury to leave that the full force of her emotions became apparent.

c. Sworn AFFIDAVIT OF **Viola M. Young-Horvath, Ph.D.** (trial observer).

Dr. Viola Young-Horvath swore under oath and penalty of perjury (Appendix p 16):

What I observed . . . was clearly inappropriate behavior on the part of Judge Chasanow that demonstrated a clear bias in favor of the government lawyers and against the lawyers of Dr. Jensvold. Following are some of my observations:

1. Repeatedly, Judge Chasanow showed through her physical behavior what under any circumstances would be interpreted as extreme frustration when Dr. Jensvold or her witnesses were testifying. For example, she threw her arms in the air, held her bent head between her hands, grimaced when certain testimony was being given, leaned forward with her head on the bench and turned totally away from the witnesses under questioning.

2. Judge Chasanow's demeanor and behavior toward Dr. Jensvold's lawyer was truly rude. In spite of the fact that Dr. Jensvold's lawyer maintained a pleasant quiet attitude, the judge displayed annoyance and repeatedly cut off her protest against questions posed, very often before she had even completed her sentence.

3. None of this behavior was evident toward the defendant's lawyers.

These behaviors were sufficiently obvious that they were a matter for discussion among observers of the trial. I personally found it unbelievable that a sitting judge showed so

little restraint. I had heard nothing prior to attending the trial about what was occurring at the trial and was astonished at such open hostility toward plaintiff and her lawyers.

d. Sworn AFFIDAVIT OF **M. Elizabeth Joyce** (trial observer).

M. Elizabeth Joyce swore under oath and penalty of perjury (Appendix pp 11-13):

> . . . [T]he judge appeared to be contemptuous of the plaintiff and biased against her case. Her attitude and language were often neither neutral nor judicial, and her rulings suggested a bias in favor of the defendant. . .
>
> . . . Even more disturbing than such rulings was the flippant, snide attitude toward the plaintiff and her case that the judge revealed through her demeanor and some of her comments. . . [e.g.,] the judge made a most derogatory, sneering comment to Dr. Jensvold's attorney (page 2993). "If you are the one who is concerned about the plaintiff appearing to be paranoid, I would suggest this is not fitting in with that little picture." Her sarcasm is evident. To use the word, "paranoid," -- which literally denotes a form of psychopathology -- about the plaintiff, suggests either bias or extreme recklessness toward Dr. Jensvold. This barely contained contempt toward Dr. Jensvold was evident to me on the days I observed the trial.
>
> . . . I saw and found . . . considerable evidence of bias against Dr. Jensvold and her case. As a citizen, I expect judges to be neutral, fair, respectful of both parties, and dutiful toward their enormous responsibilities. I was shocked by Judge Chasanow's failure to exhibit any of these qualities, and I believe ample evidence exists for granting Dr. Jensvold's appeal.

e. Sworn AFFIDAVIT OF **Colleen R. Schwenger** (trial observer).

Colleen R. Schwenger swore under oath and penalty of perjury (Appendix pp 17-18):

> . . . I was and am saddened by the way Judge Deborah Chasanow conducted the courtroom sessions. Judge Chasanow seemed from the beginning of the case to be biased . . . Obviously, the jury by its verdict did not have the wool pulled over its collective eyes by the obvious favor Judge Chasanow showed . . . the defendant's lawyers. . .
>
> I was in awe of Dr. Jensvold's lawyers, for no matter how many times they raised a point to counter the distortion of witness' testimony being stated by the defendant's attorneys and were much more often than not shot down by Judge Chasanow, they continued in a professional manner to move forward . . . Judge Chasanow's continual allowance of the defendant's lawyers to present evidence for their side (such as the psychiatrist falsely smearing Dr. Jensvold's character) may have in the end helped the jury to see more and more clearly what was taking place.
>
> I have often heard, in my adult life, people speak about the judicial system not being fair, not being trustable [sic]. I always felt that these were exaggerated claims. Now, after watching Dr. Jensvold's trial and the behavior of the Judge, I feel fearful of the system myself. May I never be in a position where I would have to be tried in front of Judge Chasanow . . . -- no matter how right and truthful my position would be.

f. Sworn AFFIDAVIT OF **Deborah J. Brower** (trial observer).

Deborah J. Brower swore under oath and penalty of perjury (Appendix pp 14-15):

> I have personally observed a number of civil court cases over a period of years, including but not limited to sexual harassment and discrimination cases. I have also been selected as a juror twice in civil cases. These opportunities have provided me with valid experiences of observing how judges judge, how judges instruct juries, and various responses of judges to attorneys' behavior in the courtroom.
>
> Based upon direct observations of Judge Chasanow compared to other judges, I will state some examples of witnessed behaviors that I deem both inappropriate and unprofessional

exhibited by Judge Deborah K. Chasanow during the trial of Jensvold v. Shalala. . .

1) Judge Chasanow frequently exhibited inappropriate, immature and unprofessional body language directed toward the Plaintiff and her attorneys: rude facial expressions (not exhibited toward the defense side); putting her head down on her arms on the bench, appearing not to be paying attention to the court proceedings; extravagant arm and hand gestures, including slamming her hands on the bench; in one instance sticking her tongue out at Plaintiff's attorney, Lynne Bernabei, after overruling Plaintiff's attorney, and while Ms. Bernabei was still speaking to the judge.

2) Judge Chasanow not infrequently exhibited what appeared as negative bias toward the Plaintiff and her attorneys, and not exhibited toward the defense side: . . . [Judge Chasanow] verbally stated in a snide tone of voice to the court and jury that she did not find the Plaintiff and her complaints credible; [she] frequently overruled the Plaintiff's attorneys before they completed stating an objection -- never observed her doing this to defense attorneys; [she] made no comments or reprimands to the defense attorneys for their disruptive behaviors -- including slamming books and stacks of paper on a table while Plaintiff's attorneys were speaking; [she] frequently explained the Defense lawyers' objections for them while they stood with their arms crossed, smiling -- never observed her doing this for the Plaintiff's attorneys. . .

3) Judge Chasanow's jury instructions seemed confusing because I am used to jury instructions which seem fair. Some of Judge Chasanow's instructions to the jury sounded unfairly leading or misleading and inappropriate. . .

As an observer of the above mentioned examples of unprofessional behaviors and what appeared as obvious negative bias toward the Plaintiff and her attorneys (and never to the defense side), there are questions in my mind as to the veracity of the trial process in this case. I have not witnessed other judges (male or female) exhibit in other courtrooms the behaviors described here.

Judge Chasanow issued biased rulings (e.g., setting up the jury to award only one dollar) and made biased statements at trial

(e.g., calling the Plaintiff "paranoid", and stating before the end of trial that she already knew how she would rule). But much of the judge's bias and antagonism was conveyed by her behavior, tone of voice and demeanor at trial and is not apparent in a cold reading of the trial transcript, although it was unmistakable to attendees of the trial, even to the jurors, all of whom noted it and discussed it. Because the demeanor, tone of voice and body language evidence of the judge's bias is not conveyed adequately by the transcript, sworn affidavits were determined by Appellant to be the best and only way, that the Appellant knows of, to present the demeanor evidence to the appeals court, whose job it is to consider claims of judicial bias in appeals of individual district court cases.

The Fourth Circuit Court of Appeals struck Plaintiff-Appellant's appendix, and along with it Appellant's demeanor, body language and tone of voice evidence of bias. Then (having struck the evidence) the Fourth Circuit denied Appellant's argument that judicial bias by the district court judge had occurred at trial and harmed the case.

REASONS FOR GRANTING THE WRIT

I. U.S. Code Section 455(a) states a judge shall disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. S 455(a). What is the standard for determining whether a reasonable person would have a basis for questioning the judge's impartiality in the case in which a judge's demeanor is a significant factor in conveying the judge's partiality?

INTRODUCTION

The U.S. Supreme Court in Liteky interprets 455(a) as follows:

> "Subsection (a), the provision at issue here, was an entirely new 'catch-all' [judicial] recusal provision, covering both 'interest or relationship' and 'bias or prejudice' grounds [citation omitted] -- but requiring them all to be *evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance.* Quite simply and quite universally, recusal was required whenever 'impartiality might reasonably be questioned.'"

Liteky v U.S. 127 L.Ed.2d 474 (1994) at 486.

127 L.Ed.2d at 488:

> ". . . A favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' because, *even though it springs from the facts adduced or the events occurring at the trial, it is so extreme as to display complete inability to render fair judgement. That explains what some courts have called the 'pervasive bias' exception to the 'extrajudicial source' doctrine.* [citation omitted]"

127 L.Ed.2d at 490 - 491:

> ". . . . [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion *unless they display a deep seated favoritism or antagonism that would make fair*

judgement impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving, or even hostile to, counsel, the parties, or their cases do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they *will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgement impossible.* . . . Not establishing bias or partiality, however are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at court room administration -- even a stern and short-tempered judge's ordinary efforts at court room administration -- remain immune."

127 L.Ed.2d at 497 in the concurring opinion:

. . . Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. Indeed, in such circumstances, I should think that any judge who understands the judicial office and its oath would be the first to insist that another judge hear the case.

The Sixth Circuit in Anderson said on page 746,

[I]t is indisputable that a trial judge can communicate hostility and bias to a jury in ways that are not ascertainable from a reading of a "cold" written record of the proceedings. It should also be noted that the court, not the jury, evaluated Anderson's Title VII claims.

Anderson v Sheppard 856 F.2d 741 (6th Cir 1988)

II. The Circuits are divided and the Supreme Court in Liteky does not address whether the type of bias above -- bias communicated at trial that is not ascertainable from a 'cold' written record of the proceedings -- may be the basis for a determination of judicial bias, and the related question, how evidence of such bias (demeanor evidence) is to be presented in the appeal of the district court case to the circuit court.

A. In the instant case sworn affidavits were submitted to document the blatant gestures and demeanor of the judge which communicated hostility and bias against the Plaintiff and Plaintiff's lawyers and behavior and demeanor dramatically favoring Defendant and Defendant's lawyers. Appellant made *the arguments* about the judge's behavior and demeanor conveying bias in the *body of the appeal*, and included *the evidence*, in the form of sworn affidavits by multiple persons present at trial, including a juror, *in the appendix* which accompanied the appeal brief.

The Fourth Circuit struck Appellant's appendix, including the affidavits about the judge's demeanor at trial, stating:

> We grant Appellee's motion to strike Jensvold's appendix, which contains affidavits and other documents which are not part of the record in the action in the district court. *See* Federal Rule of Appellant Procedure 10(a).
>
> Rule 10(a) states:
>
> The record on appeal consists of the original papers and exhibits filed in district court, the transcript of proceedings if any, and a certified copy of the docket entries prepared by the clerk of the district court.

Federal Rule of Appellant Procedure 10(a)

Because the evidence about the judge's biased demeanor at trial was not part of the official record of the action in the district court, the Fourth Circuit would not consider the evidence. Striking the affidavits effectively excluded from consideration by the court *the evidence* about the judge's outrageously biased demeanor at trial, much of which was not evident from the transcript.

Having struck the demeanor evidence from consideration, the court ruled: "We similarly reject Jensvold's claims of judicial bias, *see* In Re Beard 811 F.2d 818, 827 (4th Cir. 1987)."[1]

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[1] In In Re Beard, page 818, the Fourth Circuit rules that certain behaviors by a judge, such as referring to a key party as "a neighbor" and a "fine man" do not constitute bias.

However on page 827, the Fourth Circuit states in In Re Beard:

> . . . Disqualification is required if a *reasonable factual basis* exists for doubting the judge's partiality. Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978). *The inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's impartiality*, not whether the judge is in fact impartial. Id. at 1116.

By it's own criteria, the Fourth Circuit requires a factual basis for doubting the judge's partiality. Affidavits are the only mechanism of which Appellant is aware to communicate the *factual* basis for the demeanor bias claims to the appeals court, since much of the demeanor bias is not apparent from a 'cold' reading of the proceedings.[2]

How can Appellant demonstrate the factual basis for doubting the judge's partiality when the court disallows evidence which provides the factual basis?

B. The affidavits also go to the question of whether a reasonable person would have a reasonable basis for questioning the impartiality of the judge. Are all of the multiple affidavit authors, who have sworn under oath, unreasonable? Is a juror who says that all of the jurors noticed the judge's bias and that the judge's obvious bias was a source of discussion among the jurors not a reasonable person?

C. In Re Beard, page 827, cited by the 4th Circuit in instant case, states "[t]he alleged bias must derive from an extra-judicial source." The 4th Circuit in In Re Beard and in instant case, seems not to be aware of or not care about the 'pervasive bias exception to the extrajudicial source doctrine' delineated in Liteky by the Supreme Court. Liteky v U.S. 127 L.Ed.2d 474 (1994) at 488. The affidavits speak importantly to the question of pervasiveness of the bias, and therefore to the pervasive bias exception recognized by the Supreme Court (Liteky).

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[2] Notably, the Fourth Circuit had several choices. For example, the Court could have required such further proceedings to be held as would be justified under the circumstances. 28 U.S.C. S 2106. Instead the Fourth Circuit chose simply to strike the evidence from consideration.

D. There are multiple ways bias can be expressed, and therefore multiple types of evidence of judicial bias. The two major classes of evidence are evidence about extra-judicial sources of bias and evidence from trial.

Regarding extrajudicial sources of bias, in many cases, including instant case, there may be a number of factors about the judge which are true and which might account for the judge's bias (personal and professional dealings, associations, vested interests, childhood experiences, aspirations, conflicts of interest), but it would be speculative on the litigant's part to say what is truly the cause of the judge's bias. The litigant is not privy to the judge's psyche or to most of the judge's experiences past and present. Everyone has his or her own personal biases. Usually we are professionals and we rise above them. But sometimes we do not. In many cases it is not appropriate, and it does not advance the case, to speculate about what happened to the judge to result in his or her being biased; the issue is that the biases are being *expressed*. In many cases, requiring the litigant to prove the cause of the judge's bias would impose an unreasonable burden of proof. Must the litigant be stuck with the effects of a biased district court judge because he cannot prove the cause of the judge's bias -- something which may not be, and often is not, provable, despite being true?

The court recognized this issue when it created the pervasive bias exception to the extrajudicial source requirement in grounds for judicial bias (see Liteky). Extrajudicial source bias requires proving the source of the bias, whereas the pervasive bias exception requires proving a level of hostility and pervasiveness in the case proceedings, rather than proving the cause.

Trial evidence of bias may include at least three types: judicial rulings, words, and demeanor. The strongest case might be one which had evidence of all three types. The appeal in instant case argued that all three types of evidence of the judge's bias were present at trial. However, as the Supreme Court noted in Liteky, ". . . judicial rulings alone almost never constitute valid basis for a bias or partiality motion. . ." 127 L.Ed.2d at 490. Examples of the judge's biased words were cited in the appeal, but the words alone do not convey the true extent of the bias, i.e., the hostility of the judge and pervasiveness of the bias. The demeanor evidence *combined* with the rulings evidence and word evidence is quite powerful, persuasive, and goes to the issue of, at least, whether a reasonable person would have a reasonable basis for

questioning the impartiality of the judge, the criterion required by S 455(a), the Supreme Court in Liteky, and the 4th Circuit in In Re Beard.

A clever but biased judge may know how to convey his or her biases loudly and clearly through demeanor, body language and tone of voice, making his or her biases abundantly clear to those present, without necessarily being apparent in the trial transcript.

E. A mechanism is needed at the Circuit Court of Appeal level for considering evidence of a district court judge's biased behavior and demeanor at trial. If there is no mechanism at the appeal level for considering evidence regarding the nature of the judge's demeanor at trial, other than what is apparent from reading the trial transcript, then an entire type of important evidence of judicial bias (demeanor evidence) is shut out.

III. The related issue of whether, or how important, it is for the district court judge to not only be impartial, but also to have the *appearance* of impartiality, is the subject of conflict between the circuits, despite Liteky.

A. The Fourth Circuit's ruling in instant case, striking the judicial demeanor evidence from consideration and failing to find any other mechanism for considering the evidence, suggests disregard by the Fourth Circuit for concerns about appearances of impartiality by district court judges. This conflicts with decisions in several other circuits, including the Fifth, Sixth, Ninth, and Tenth Circuits, concerning appearance of impartiality by district court judges.

B. The Fourth Circuit in In Re Diana Heard 811 F.2d 818 (4th Cir 1987) found that a judge calling an attorney a 'son-of-a-bitch' and a 'wise-ass' lawyer was not sufficient grounds for disqualification.

C. The Sixth Circuit has a different standard. Anderson v Sheppard 856 F.2d 741 (6th Cir 1988) page 745 says in citing another case:

As this court has repeatedly noted, "great care must be taken by a judge to 'always be calmly judicial, dispassionate and impartial. He should sedulously avoid all appearances of

advocacy. . .'" In sum, "the basic requirement is one of impartiality in demeanor as well as in actions." . . .

Sixth Circuit cites Connelly v United States District Court, 191 F.2d 692, 697 (9th Cir 1951):

> "It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there shall also be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality."

In Roberts v Balair 625 F.2d 125 (6th Cir 1980) the judge before the trial said to the effect of, "I know Postmaster Branley and he would never intentionally discriminate." That remark was enough to get the judge disqualified in the 6th Circuit court.

In Roberts, page 130, the Sixth Circuit said:

> We intimate no opinion regarding the actual impartiality of the District Judge. Instead, it is the appearance of impartiality with which we are concerned. [Footnote omitted.] As the Supreme Court has written, "justice must satisfy the appearance of justice. [Footnote omitted] Clearly under S 455(a), the district judge had a duty to recuse himself in order to preserve the indispensable semblance of fairness.

D. In contrast to the Fourth Circuit, the Sixth and Ninth Circuits require not only absence of bias but absence of appearance of bias. The dissent in the 6th Circuit case Anderson, cites to the 4th Circuit case In Re Beard, highlighting that there are splits between the circuits.

E. The Tenth and Fifth Circuits set somewhat different standards but are closer to the Sixth Circuit than the Fourth Circuit:

In Nichols v. Alley CA 10 71 F.3d 347 (1995), the Tenth Circuit removed a judge whose behavior it commended but, because of the circumstances of the case,

> . . . "a reasonable person, knowing [all the relevant facts], would harbor doubts about the judge's impartiality". . . . As the Fifth Circuit concluded in Jordan, "[p]ublic respect for the judiciary demands this result." 49 F.3d at 157. The effect

> of our decision today may indeed be to "bar trial by [a] judge who ha[s] no actual bias and who would do [his] very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice." . . .

F. By Fourth Circuit case standards, District Judge Chasanow's conduct may be acceptable. By Sixth, Fifth, Ninth or Tenth Circuit standards, it probably would not be. The Supreme Court in Liteky tried to bring order to the field by setting a fairly high threshold:

> 127 L.Ed.2d at 490 - 491:
>
> ". . . . [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion *unless they display a deep seated favoritism or antagonism that would make fair judgement impossible.*
>
> And in the concurring opinion, 127 L.Ed.2d at 497:
>
> *. . . Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified.*

That is, the Liteky standard for judicial bias requires determining whether the judge displays a "*deep seated favoritism or antagonism that would make fair judgement impossible*", or, per concurring opinion, whether "*an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified.* "

G. Demeanor evidence (evidence about the judge's demeanor and behavior at trial which may not always be evident in reading of the transcript) is highly relevant to the determination of levels of favoritism, antagonism, and perception of the possibility or impossibility of a fair trial. Demeanor evidence is highly pertinent to the application of the Supreme Court standard set in Liteky to individual cases on appeal to circuit courts. The

Supreme Court should clarify what role demeanor evidence has, and whether and how demeanor evidence is to be entered into consideration in the appeal process.

CONCLUSION

Judicial bias, occurring for whatever reason, at the trial level effectively removes due process, because higher courts generally are loath to and are not mandated to question the factual and credibility determinations made by district court judges. Judicial bias at the trial level is very important, because if there is bias at the trial level that is never appropriately dealt with, the litigant is effectively excluded from due process, and effectively never has his day in court.

The issues of (1) bias beyond what is evident from a cold reading of the trial transcript, and (2) the appropriate mechanism by which Appellant may introduce evidence about a district court judge's outrageously biased behavior at trial into the circuit court appeal of the case, have not been addressed by the Supreme Court. Circuit Courts, whose rulings conflict regarding appearance of impartiality by the judge, need guidance and clarification of these issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Margaret F. Jensvold, M.D.

Date: 9/28/98

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

MARGARET JENSVOLD, M.D.,

Plaintiff-Appellant,

v.

No. 96-1964

DONNA E. SHALALA, SECRETARY of HEALTH AND HUMAN SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Deborah K. Chasanow, District Judge.
(CA-90-3123-DKC)

Submitted: January 27, 1998
Decided: March 30, 1998

Before MURNAGHAN and ERVIN, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Margaret Jensvold, Appellant Pro Se. Kathleen McDermott, Office of the United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Margaret Jensvold, M.D., appeals from the district court's final order dismissing her employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. ß 20OOe-2(a) (West 1994). Jensvold alleged discrimination on the basis of her gender and retaliation. Jensvold also appeals the district court's pre-trial dismissal of her claim of sexually hostile work environment.

Our review of the record and the district court's opinions discloses that this appeal is without merit. As a preliminary matter, we affirm the district court's dismissal of Jensvold's claim of sexually hostile work environment on the reasoning of the district court. *Jensvold v. Shalala,* No. CA-90-3123-DKC (D. Md. Mar. 29 & May 3, 1996).

We next address Jensvold's appeal of the district court's dismissal under Fed. R. Civ. P. 52(a) of the remainder of her claims. It is the function of the trial judge under Rule 52(a) to make findings of fact which will not be set aside unless clearly erroneous. *See Tidewater Equip. Co. Inc.,* 65O F.2d 503, 507 (4th Cir. 1981). Findings of discrimination, discriminatory intent, and causation are findings of fact. *Anderson v. City of Bessemer City,* 470 U.S. 564, 573 (1985) (discrimination); *Pullman-Standard v. Swint,* 456 U.S. 273, 287-90 (1982) (discriminatory intent). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson,* 470 U.S. at 574. Nor will this Court second-guess the district court's determinations as to the credibility of witnesses. *See Murdaugh Volkswagen, Inc. v. First Nat'l Bank of* S.C., 801 F.2d 719, 725 (4th Cir. 1986). We reject Jensvold's claims on appeal that the district court's ultimate finding of nondiscrimination, which was based in large part on credibility determinations, was clearly erroneous.

We find that while the district court's dismissal of Jensvold's claims arising from Appellee's post-employment conduct on the basis of this Court's decision in *Robinson v. Shell Oil Co.,* 70 F.3d

325 (4th Cir. 1995) (en banc), was in error,* such error was rendered harmless by the court's determination of Jensvold's post-employment Title VII claims on the merits. Such adverse determination was not clearly erroneous. *See Anderson,* 470 U.S. at 573.

We similarly reject Jensvold's claims of judicial bias, *see In re Beard,* 811 F.2d 818, 827 (4th Cir. 1987), and abuse of discretion as to the district court's evidentiary rulings. *See Persinger v. Norfolk & W. W. Ry.,* 920 F.2d 1185, 1187 (4th Cir. 1990). The disposition of this appeal renders a determination of Jensvold's claim regarding the constitutionality of Title VII remedies unnecessary. Finally, to the extent Jensvold raised other claims not specifically addressed here, we find such claims to be without merit. We therefore affirm the district court's order dismissing Jensvold's case pursuant to Rule 52(a) on the reasoning of the district court.

We grant Appellee's motion to strike Jensvold's appendix, which contains affidavits and other documents which are not part of the record in the action in the district court. *See* Federal Rule of Appellant Procedure 10(a).We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED-

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* We note that the Supreme Court's decision in *Robinson, 117 S.* Ct. 843 (1997), was rendered while this case was pending on appeal. Hence, the district court's reliance on this court's decision in *Robinson* in dismissing Jensvold's post-employment Title Vft claims was not misplaced.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARGARET JENSVOLD, M.D.

v.

CIVIL NO. DKC
90-3123

DONNA SHALALA, SECRETARY
DEPARTMENT OF HEALTH AND
HUMAN SERVICES

ORDER OF JUDGMENT

The court having returned a verdict in favor of Donna Shalala, Secretary of the Department of Health and Human Services against Margaret Jensvold, IT IS this 28th day of March, 1996, by the United States District Court for the District of Maryland, ORDERED that:

1. Judgment is entered in favor of Donna Shalala, Secretary of the Department of Health and Human Services against Margaret Jensvold;

2. Any and all prior rulings made by this court disposing of any claims against any parties are incorporated by reference herein and this Order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58;

3. The Clerk is directed to close this case; and

4. The Clerk is directed to mail a copy of this Order and the foregoing Memorandum Opinion to counsel for the parties.

s/ Deborah K. Chasanow
DEBORAH K.
CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARGARET JENSVOLD, M.D.

v.

Civil Action No.
DKC 90-3123

DONNA SHALALA, SECRETARY
DEPARTMENT OF HEALTH
AND
HUMAN SERVICES

MEMORANDUM OPINION

Margaret Jensvold, Plaintiff, brought this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. ß 2000e, et seq., against the National Institutes of Mental Health ((NIMH))[3] alleging that (1) she was denied the full benefit of her fellowship; (2) she was denied the third year of the staff fellowship; and (3) NIMH retaliated against her after she left, all on the basis of gender discrimination.[4] Because of the uncertainty of the application of

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[3] The National Institutes of Mental Health was, at the time of Plaintiff's employment, a component of the Alcohol and Drug Abuse and mental Health Administration ("ADAMHAI") , a part of the Public Health Service, which is under the supervision and direction of the Department of Health and Human Services. Since 1992, NIMH has been part of the National Institutes of Health, which is also under the supervision and direction of the Department of Health and Human Services. When referring to the specifics of Plaintiff's employment "NIMH" will be used. At times, the entire campus and is referred to as "NIH."

[4] Certain alleged acts in this case were determined to be time barred because they were isolated employment decisions made before October 15, 1988. They included Plaintiff's claim that Dr. Rubinow "ordered" her into psychotherapy with Dr. Silber in March 1988, and Dr. Rubinow's decision, announced in September 1988, that Plaintiff's medical staff fellowship would not be renewed for a third year. In addition, there is no claim in this case of a generally hostile work environment. The only issue regarding Plaintiff's claim of gender discrimination is whether she was denied the full benefits of her employment as a medical staff fellow.

the Civil Rights Act of 1991, the case was tried before a jury which found, inter alia, that (1) mentoring was a benefit of employment as a medical staff fellow that was denied to Plaintiff as a result of gender discrimination causing damage to her professional reputation; and (2) analysis of blood samples after July 12, 1989 was a benefit of employment as a medical staff fellow that was denied to Plaintiff as a result of retaliation causing damage to Plaintiff's professional reputation. The jury awarded $1.00 in nominal damages. After the verdict, but before the court could decide the issues concerning equitable relief, the Supreme Court decided Landgraf v. USI Film Prods., ___ U.S. ___, 114 S.Ct. 1483 (1994), and held that the 1991 Act was not to be applied retroactively to alleged acts of discrimination committed before November 21, 1991. Accordingly, the jury's verdict will be treated as advisory only and the court will make findings of fact and conclusions of law under the statutes as they existed prior to the 1991 amendments. Furthermore, the Fourth Circuit recently decided that Title VII does not apply to former employees. Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995) (en banc). Thus, Plaintiff's claims arising from alleged onduct after she concluded the medical staff fellowship and ceased being an employee on July 12, 1989 are not cognizable and must be dismissed. The following constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

OVERVIEW

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. ß 2000e, et seg., makes it unlawful for an employer to discriminate against an employee with respect to any of the terms, conditions, or privileges of employment because of the employee's gender or because the employee has filed a complaint of discrimination. To prove intentional gender discrimination, Plaintiff must prove that she was treated differently because she was a woman. To prove retaliation, Plaintiff must prove that she participated in a proceeding protected by Title VII, and that her employer discriminated against her with respect to a term, Condition, or privilege of employment because of her participation.

A successful Title VII sex discrimination case based on a theory of disparate treatment requires proof of discriminatory intent. Plaintiff can satisfy her burden of proof through either

direct proof of discriminatory intent, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985), or through the indirect, burden-shifting method of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The McDonnell Douglas approach consists of three stages of analysis summarized as follows:

> The plaintiff must first make out a prima facie case of discrimination. Establishing a prima facie case shifts a burden of production to the defendant to present evidence of a legitimate, nondiscriminatory reason for the adverse action. If the defendant produces evidence of such a reason, then the plaintiff must show that the reason presented by the defendant is merely a pretext for discrimination. The plaintiff retains the ultimate burden of persuasion throughout the process.

Jamil v. Secretary, Dep't of Defense, 910 F.2d 1203, 1206 (4th Cir. 1990).

To be intentional, the discrimination must have been voluntary, deliberate and willful, and not accidental or inadvertent. Plaintiff is not required, however, to produce direct evidence of discrimination. Intentional discrimination may be inferred from the existence of other facts.

In showing that gender or prior EEOC filing was a motivating or determining factor, Plaintiff is not required to prove that it was the sole motivation, or even the primary motivation for the Defendant's decision. Plaintiff need only prove that gender or the prior filing of an EEOC complaint played a part in Defendant's decisions even though other factors may also have motivated Defendant.

There is a threshold question presented by Plaintiff Is claims. Not every aspect of an employment relationship constitutes a "term, condition, or privilege" of employment. Sometimes terms and conditions may be set by an employment contract, whether formal or informal, and any such terms promised to an employee as part of the employment contract cannot be withheld on the basis of gender. Furthermore, even if an employer has no contractual obligation to provide employees with a particular benefit, the benefit may become a privilege of

employment if it is provided to some employees. Such a benefit -- or incident of employment --similarly may not be provided in a discriminatory manner. Thus, the phrase "terms, conditions, and privileges of employment" includes any benefit that was part and parcel of the employment.

Plaintiff cannot contend that she was denied the contractual terms of employment, such as the position and salary. She claims, however, that the Defendant denied her the full benefits of employment as a medical staff fellow at NIMH by denying her mentoring and other supervision, and by denying her the opportunity to work on important biological psychiatric studies, to collaborate and co-author with senior scientists, to attend conferences, to remain at NIMH in some capacity other than a medical staff fellow after the second year so that she could publish the results of her research, to see patients after the termination of her fellowship, to have blood samples analyzed, to have a guest researcher position with Dr. Rubinow or with Dr. Putnam, and to be included as co-author on studies. The jury concluded that all seven items were in fact terms, conditions, or privileges of employment although it concluded that Plaintiff had only been denied three of them.

All alleged terms of employment that post-date Plaintiff's departure cannot, as a matter of law, constitute actionable employment actions in light of Robinson v. Shell oil Co., 70 F.3d 325 (4th Cir. 1995) . As a matter of fact, I conclude that mentoring was a benefit of the medical staff fellowship, but that the opportunity to stay on after the fellowship in any capacity other than as a medical staff fellow was not. Nor, were the issue before me as a matter of fact, would I conclude that the opportunity to see patients, the analysis of blood samples, or the inclusion as co-author, all after July 12, 1989, were benefits of the employment relationship. These requests are made available on an ad hoc basis as it suited NIMH and were not promised to the employee.

The next question to address will be whether Plaintiff was denied mentoring as part of the fellowship. Based on the testimony at trial, I define mentoring as the opportunity to work with a senior scientist on research projects and to receive guidance from the senior scientist on procedures for planning, implementing, recording, and reporting results of the projects. In order to receive mentoring, a fellow has to be assigned to work in the lab of a senior scientist and to have the opportunity to join in

the lab's work. She also has to have a chance to talk on a regular basis with the mentor, to ask questions, and to receive feedback on her own work. Plaintiff received mentoring during her fellowship. What she really complains about is that she did not establish as good a mentoring relationship as she had hoped. Disappointment of that-type cannot be characterized as denial of a term, condition, or privilege of employment. Congress simply cannot legislate that all employment relationships enjoy the best communication or provide the most rewarding learning experience. Title VII can only mandate that employees receive the basic components of the position.

Moreover, the undersigned concludes that whatever deficiencies existed in the relationship between Dr. Jensvold and Dr. David Rubinow were not the result of intentional gender discrimination by Dr. Rubinow, nor even the result of gender stereotyping. Dr. Rubinow treated Plaintiff the same as other fellows and always reacted to her as an individual. There simply is no credible evidence to support Plaintiff's perception that her gender affected that relationship, other than in her own mind.

Hindsight is, in this case, myopic, very far from twenty-twenty. No matter how much magnification is applied to the facts of this case, Plaintiff Is version of events remains an illusion. Her skewed perception of events, whether after-the-fact rationalizations borne of a personal sense of failure, or a contemporaneous self -fulfilling prophesy, is entirely of her own creation. Dr. Jensvold was ready to see sinister motive in any action she perceived as remotely critical of her. This is unfortunate, for she obviously had promise as a medical researcher. Instead of trying harder, she sought to lay blame on others.

EVIDENCE

The court heard from many witnesses, including present and former employees at NIMH, friends of Plaintiff, and expert witnesses. The major participants in Plaintiff's experience were Dr. Rubinow, Chief of the Section on Behavioral Endocrinology in the Biological Psychiatry Branch, and Dr. Peter Schmidt. Others in the lab included Dr. Kirk Denicoff, Jean H. Murphy, Gay Grover, Kari Muller, Candace Davis, Chris Berrittini, and Theresa Durkin.

Dr. Kay Deaux testified about sex stereotyping, specifically how stereotypes operate in the environment. She explained that, in her view, people have beliefs on which they may act. For example, a person who believes women are less competent than men will give less important tasks to women. Common stereotypes about women are that they are more dependent and emotional than men, and less competent. Both men and women hold stereotypes. Conditions that often lead to action based on stereotypes include (1) if a woman is a rarity in an organization, (2) if tasks are distributed unequally, (3) if events make gender salient, (4) if decisionmaking is by one person without accountability, and (5) if criteria are not clear. After recounting the materials she reviewed and the facts she found to exist, Dr. Deaux expressed the. opinion that stereotypes were being used and applied to Plaintiff. While I found Dr. Deaux's testimony interesting in a general sense, her conclusions were not helpful. One must, as I did as factfinder, consider the entire environment in which language is used to determine its import. Because I find that certain words were not used as alleged by Plaintiff, Dr. Deaux's opinions that stereotyping was afoot must be rejected.

Dr. Leah Dickstein testified about mentoring. She described the core elements of a fellowship including the concept of protected research time. To her, mentoring is close, ongoing supervision, the sharing of research experiences, and encouragement. Meetings should be structured, at least once a week formally, and the relationship should be safe and respectful. Because of the nature of mentoring, and the presence of few women, she sees barriers to effective mentoring for women. Again, this testimony was helpful in a general sense, but the need to determine the credibility of the witnesses undermines the strength of her characterizations of the essential nature of the mentor relationship.

Plaintiff's Experience at NIMH

NIMH offers several types of medical fellowships to graduate students. Plaintiff was offered a medical staff fellowship by Dr. Rubinow in the Biological Psychiatry Branch of NIMH beginning in July 1987. The fellowship was for an initial two years, but a one year extension was possible. This fellowship differs from a visiting fellowship, primarily for foreign doctors, and from other programs.

Application Process and Offer

Plaintiff received her undergraduate degree in 1979 from UCLA in biochemistry, summa cum laude and Phi Beta Kappa. After attending Johns Hopkins University School of medicine, she received two years of her residency training at the University of Pittsburgh. Dr. Jensvold testified that she had planned a career in medicine, probably in research and science, but, as she completed her undergraduate years, she had not settled on a choice between psychiatry and obstetrics/gynecology. She originally planned to pursue a fellowship in pre-menstrual syndrome ("PMS") after her third year of residency.[5] At a meeting in. December 1986, she encouraged to start her fellowship a year earlier. Plaintiff contacted the University of California in San Diego, the State University of New York at Buffalo, and NIMH. She claimed to have desired a three-year fellowship and testified that she was told by a number of people associated with NIH that fellows who wanted to stay. for a third year could do so. Dr. Kaye suggested she contact Dr. David Rubinow, which-she did. She interviewed with him March 20, 1987 at NIMH.

On that trip, Plaintiff met several people in the laboratory, including Kari Muller and Dr. Peter Schmidt. In retrospect, Plaintiff claims the latter's manner was gruff and inhospitable. At the time, however, she apparently felt no discomfort because she readily accepted the offer made a day or so later by Dr. Rubinow, after he checked the technicalities and concluded that he could hire another staff fellow. In mid-June, Dr. Rubinow and Plaintiff agreed she would start at NIMH on July 6, 1987. Plaintiff now speculates that there must have been discussions of her history and personal life among the others before her arrival.

Dr. David Rubinow, who first came to NIMH in 1979 and studied under Dr. Robert Post, does not disagree with the timing and basic outline of events leading to Plaintiff's arrival. Dr. Rubinow's first medical staff fellow was Dr. Kirk Denicoff beginning in July 1986, followed by Dr. Peter Schmidt, also that summer. Plaintiff came in July 1987, and Dr. Tung Ping Su began in the Fall of 1989. Others who followed included Dr. Donald Rosenstein and Dr. Maury Tobin. All initially came for a two-year period. Eventually Dr. Rubinow offered a third year to three of them: Schmidt and Rosenstein, who accepted, and Tobin, who could not stay.

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[5] This corresponds to the fourth year "post graduate" because one year of internship follows medical school and precedes the residency.

Dr. Rubinow learned of Plaintiff through a Dr. Kaye, who notified him that he knew of a resident interested in coming to NIMH for PMS research. At that time, nothing was said of the resident's personal life or that Dr. Kaye had dated her. Dr. Rubinow interviewed Plaintiff in his office in March 1987. They talked about the unit and her interests. Plaintiff also spoke with Drs. Schmidt and Denicoff, and Ms. Berrittini. Dr. Schmidt was favorably impressed; the others expressed reservations. Dr. Rubinow thought Plaintiff was enthusiastic, articulate, bright, and a little anxious. The job was formally offered to Plaintiff shortly after the interview. Dr. Rubinow does not recall when he learned of a disagreement between Plaintiff and the chair of the department at Pittsburgh, but Plaintiff explained the reason for it. Dr. Rubinow categorically denied ever discussing Plaintiff's personal life within the group before or after hiring her, and before her arrival.

Dr. Schmidt recalls interviewing Plaintiff in March 1987, and having a favorable impression. She was pleasant, sociable, and interested in the work they were doing. He thought she would make a reasonable contribution to the group. He knew nothing about her personal life before she arrived. What he learned he learned from her during her first year there. For example, while walking to Wednesday *morning rounds,* Plaintiff said her marriage had been somewhat traumatic.

Candace Davis recalled interviewing Plaintiff in the Spring of 1987. Afterward, Dr. Rubinow spoke with her and Ms. Berrittini and asked what they thought. Ms. Berrittini expressed some reservations, and Ms. Davis said that Plaintiff was not too chatty or friendly, but that they could work with anyone for two years. Dr. Rubinow summarily mentioned that Plaintiff had had some problems, but whatever they were, they were behind her and would not impact on her ability to do research with them.

Christine Berrittini is a psychologist who worked at NIMH from 1980 until 1989 as a research social worker. She described Dr. Rubinow as a nice, fair person, who was supportive in allowing people to do what they wanted if the work could be accommodated to within the goals of the laboratory. She met and interviewed Plaintiff when she was being considered for a fellowship. When asked by Dr. Rubinow, Ms. Berrittini re commended against hiring Plaintiff based on her "gut" feeling that she would not fit in well. No one else was involved in the discussion. She did not have much interaction with Plaintiff once

she arrived, although the two did have lunch once in August or September of 1987 when Plaintiff mentioned aspects of her personal life. She denied sharing that information with anyone else.

Arrival at NIMH

At the initial orientation program, Plaintiff was given a manual that, inter alia, explained that fellowships were for two years, with an optional third year, and after that, any continuation of the fellowship was at the discretion of NIMH. (Plaintiff's Exhibit No. 26).

Plaintiff describes as the first act of discrimination a problem with a parking permit. She claims that she was not properly taught the rules and was accused of being "demanding" and acting"entitled" when she inquired about why she had to share a parking permit with Dr. Denicoff. Allegedly, Dr. Rubinow told her she had to apologize to Sandra Rucker,[6] Dr. Post's secretary, who handled the parking permits for the office. She claims that Dr. Denicoff told her it was no big deal, but Ms. Rucker stopped talking to her. Two months later, Plaintiff claims that Dr. Rubinow brought it up again, stating that he had learned that she had failed to apologize. He said it was still a problem, that she needed to apologize as directed earlier, and apologize to Dr. Schmidt as well.

Sandra Rucker is a budget analyst at NIH. In 1987, her duties included helping to process new medical staff fellows. Parking at NIH is a perennial problem; there are never enough permits. Senior researchers would get the red permits first and the newer fellows always had to share. Those who worked together in the same lab or section were asked to share so that arrangements would be easier. In July 1987, Plaintiff, who was agitated over the fact that she would have to share a permit, went to Ms. Rucker's office. The encounter was sufficiently unpleasant that she mentioned it to Dr. Rubinow. A few days later, Plaintiff went in again and said that it had been suggested that she apologize. Dr. Jensvold said this was not the way to begin our

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[6] At the time of Plaintiff's employment, Dr. Post's secretary Sandra Rucker. Ms. Rucker later married and changed her was Ms. There was testimony at trial referring to her last name to as both Ms. Rucker and Ms. Gault. For purposes of simplification, she is mentioned here only as Ms. Rucker.

relationship, and it is best to get a fresh start. Ms. Rucker believed they did and does not recall any further discussions about the apology.

According to Dr. Rubinow, Ms. Rucker talked to him about Plaintiff's manner in complaining about the parking permit situation, which offended Ms. Rucker. Dr. Denicoff, two years Plaintiff's senior, also approached him about the same incident. He discussed the situation with Plaintiff, told her that the other two were upset, and emphasized that it was important to make a good first impression in a new group. Plaintiff began to cry and said she had ruined everything. Dr. Rubinow said that she had not but that she would feel better if she apologized. There was no "order" for Plaintiff to apologize. He does not recall any other mention of the incident.

Plaintiff's recollection does not entirely mesh with the testimony of others and, on balance, I conclude that Plaintiff's version is widely exaggerated and skewed. While obviously some controversy existed over the parking situation, it was not a reflection of general gender discrimination or instigated to cause Plaintiff harm.

Kiawah Conference

A primary early bone of contention for Plaintiff was the Kiawah conference, held on September 9 - 13, 1987. Plaintiff says she spoke to Dr. Rubinow on three occasions about the conference, but he was noncommittal. Shortly before the conference, Dr. Schmidt told her it was not important to attend and that she should not unless someone else was paying. Plaintiff did not attend. Afterward, Dr. Schmidt allegedly waxed. eloquent about how wonderful the conference had been, that all leaders in psychology and gynecology had been there and that their group had made five presentations, an impressive showing. He downplayed her lament about not going by saying someone in her station should not aspire to such things yet. Plaintiff claims she then confronted Dr. Schmidt about whether he was intentionally excluding her from the conference and was doing the longitudinal study without her. He praised her for coming directly to him, but never got back to her on those concerns. Instead, she heard again about the parking problem.

Again, the recollections of the other participants differ. Dr. Rubinow helped to organize the Kiawah conference and

presentations were planned by Drs. Schmidt and Denicoff. He recalls no conversation with Plaintiff about the conference. He neither prohibited nor forbade her to attend. He has never prevented anyone from attending a conference, although he encourages fellows to give priority to data presentation over just attending. He has never attended a conference to network. Plaintiff expressed several complaints about Dr. Schmidt and Dr. Rubinow said it was important for everyone to get along and that he would talk to Dr. Schmidt. He told Dr. Schmidt about Plaintiff's concerns and that both of them had to make an effort to work together.

Dr. Schmidt attended the Kiawah conference in September 1987 and presented an abstract series. He recalled a conversation with Plaintiff, but does not recall . whether she asked if she should attend. His experience was that if he was not presenting something, there was no funding. He denied discouraging her from attending and had no authority to decide whether she went or not. After the conference, Dr. Rubinow told him that Plaintiff thought he had been discouraging to her both about the conferences and about courses. Dr. Rubinow told him to work things out with Plaintiff.

Plaintiff has not proven that she was prevented from attending this, or any other conference, and certainly not that any advice she got on this occasion had anything to do with her gender. She attended at least ten conferences and training seminars, all over the United States, in Canada, and one in Amsterdam.

Treatment in Laboratory

In the Winter of 1987, Plaintiff claims she overheard comments in the laboratory about female researchers /scientists, by Drs. Schmidt and Denicoff, in Dr. Rubinow's presence, that were demeaning to the women and derogatory. After hearing the witnesses, I find that no clearly sexist comments were made and that, in any event, any remarks about other people were not indicative of gender bias against Plaintiff.

Plaintiff also claims there were explicit sexist cartoons and computer screen savers clearly in sight in Dr. Rubinow's office. starting around Christmas, 1987, a card was displayed on the wall over his desk depicting a physician dressed in camouflage with a miniskirted nurse on her knees in front with her hands on his chest and her head in his crotch. The doctor had little syringes on

his belt and held a large syringe in a phallic position. Dr. Rubinow acknowledges that the card was displayed among many holiday greetings that year, but that until this case, no one had suggested there was a problem and he did not see anything wrong or offensive with it at the time. Plaintiff claims the card was still there in July, an assertion I find dubious.

Later, Plaintiff claims that Dr. Rubinow made sure she was exposed to a photograph of Cheryl Tiegs, allegedly in the center' of a target in a suggestive pose. The so-called target actually was a clock face that was part of a screen saver displayed briefly on Dr. Rubinow's computer. Both he and the person who installed it were consistent in their explanation. Ms. Candace Davis was responsible for putting the offending Cheryl Tiegs screen saver on Dr. Rubinow computer. In the Summer of 1988, she got the program from her husband. The clock face ticks off the time so the screen image changes. Dr. Rubinow does not like to be ruled by a clock so she put the program on his computer as a tease. She did not ask his permission. He did not recall the image being on the screen for more than a fraction of a second when the computer was turned on, and he did not see it as inappropriate.

From the vantage point of the mid 1990's, and in light of the evolving environment of employment discrimination law, these depictions ought not be displayed in a workplace where co-workers or visitors might view them. But that is a far cry from concluding that their display is evidence of gender bias. After hearing all of the witnesses, and observing their demeanor, I conclude that Dr. Rubinow did not allow these items to be displayed out of any gender bias, overt or subconscious.

Plaintiff's last day was July 12, 1989. Early in the afternoon, Plaintiff said that an administrative aide told her to turn over her beeper, ID card, and keys immediately. She explained that she needed to keep the keys for a few hours and did not have her ID with her. Twenty minutes later, the person came back and said her response was not acceptable, that she had to turn over her ID and keys immediately. Plaintiff became upset and learned that Dr. Rubinow had contacted the administrator's office several times to make sure the three items were obtained from Plaintiff. Dr. Rubinow testified that he knew she stayed in the lab after the close of business and that he was concerned that the key not remain in hands of unauthorized personnel. Even if he encouraged the administrators to obtain the key from Plaintiff,

that is not an indication of gender discrimination or, by itself, a sufficiently serious issue.

Studies

At Dr. Rubinow's suggestion, Plaintiff discussed the available projects and her interests with Dr. Schmidt shortly after her arrival. She claims to have expressed her desire to work on a longitudinal study and asserts that he told her they could work together. After the Kiawah conference, Plaintiff says she learned he was already seeing patients for a longitudinal study, contrary to what he had told her. Dr. Rubinow assigned Plaintiff to work on at least eight studies in the Fall of 1987: pregnancy and postpartum, trauma and post traumatic stress disorder, asthma, scleroderma, obsessive/compulsive disorder, PMS support group, clonidine, and sleep data. In her view, only the clonidine study was a biological study. other biological studies underway in Dr. Rubinow's lab at the time included the RU 486 study. In addition, according to Plaintiff, ongoing treatment studies were being conducted, but without her participation. Plaintiff described in detail her work on various studies, and told of her interaction with Dr. Rubinow and others. According to Dr. Jensvold, when she asked Dr. Rubinow in February 1988 to work on long-term trials, he told her it would be a waste of her time; she should instead enjoy her free time.[7]

Dr. Rubinow described all of his studies as biological, as opposed to psychosocial which he defined as centering on information from surveys and dealing with attitudes and on biologically driven behaviors. A medical staff fellowship is an opportunity to learn how to do research, to apply the general principles of designing and carrying out a study, and then writing it up. The concepts and techniques of a good study are the same across a whole range of studies. A biological study measures things such as hormones or brain waves, studies processes that are biological, like the menstrual cycle, or has a biological disorder as the focus. A protocol is the recipe for the study, including the justification for undertaking it and the assurance that no patient will be harmed. A study is a specific research question, and a protocol is a proposal for a series of studies and questions. For

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[7] Much trial time was devoted to testimony about specific studies, to prove that those assigned to Plaintiff either were or were not comparable to those assigned to others in terms of importance -and contribution to an education in scientific research. The details of that testimony will not be recited here.

example, the PMS overview protocol enabled them to bring in patients and obtain measures, giving rise to a number of research questions. It is helpful to some extent to know how to write a protocol. The "principal investigator" is the person generating the protocol and study, frequently the section chief. The assignment of studies in his section is geared to providing an opportunity for fellows both to be involved and to begin their own. Drug or pharmaceutical company involvement in his section was limited to providing a drug and the matching placebo. The advantage-to him was to obtain expensive drugs that were otherwise difficult to obtain. The disadvantage was the hoops one had to jump through with the companies. It was not a required part of an NIMH fellowship, and he had no responsibility to arrange for a drug study for every fellow.

A "long-term treatment trial" involves the controlled administration of drugs or placebos to patients over weeks or months. Short-term treatment trials are "challenge studies," lasting several hours during which the researchers watch to see if the patient has an acute response. All other things being equal, Dr. Rubinow prefers short-term trials. They result in more papers. Long-term trials take a tremendous amount of time and many problems can interfere with them and "muddy" the data. The mode of analysis and the mechanics are identical. Dr. Rubinow also provided detail about the specific projects assigned to Plaintiff.

Plaintiff has not proven that, overall, the studies to which she was assigned differed significantly from those assigned to other researchers in terms of providing the research experience essential to the fellowship. There is, moreover, no evidence that the assignment decisions were based at all on gender. Dr. Rubinow assessed Plaintiff Is own progress in determining how much she could take on. Rather, it appears that Plaintiff did not take full advantage of the research opportunities available to her, and any disappointment stems from that failure alone.

Mentor Sessions

Dr. Rubinow's practice was to set up a mutually convenient time to meet with a medical staff fellow on a regular basis. Other meetings could be arranged as needed, and his door was open when the need arose. The times for his regular meetings with Plaintiff changed. Initially, in the Fall of 1987, they met on Thursday mornings. As of January 1988, the time was Friday

afternoons at 3:00 p.m., and the time was changed in late January or early February to 1:00 p.m.

Dr. Rubinow described his interactions with Plaintiff as reasonably cordial. If he learned anything about her personal life, it was because she told him voluntarily. There was some variability in her demeanor. She was not infrequently teary, expressing unhappiness about what was going on in her personal life and at work, specifically mentioning her poor relationship with Dr. Schmidt and her view that Kari Muller was condescending. He denied ever referring to Plaintiff as narcissistic, entitled or demanding or ever stating that no one wanted to work with her because she was competent and attractive. On one or two occasions when Plaintiff's distress was palpable, he suggested that she go into psychotherapy. The first time it came up, Plaintiff said she had been in therapy before.

Plaintiff described the general tenor of the sessions as lacking in structure, providing no formal evaluation except when she got hostile criticism- She asserts that she was never properly taught how to write protocols or provided sufficient opportunity to co-author publications with Dr. Rubinow.

Both testified about a few specific meetings in starkly different terms. Their different perceptions of the events ought not obscure the fact that the two met regularly to discuss the work being conducted and Plaintiff's contributions to the studies. Indeed, Plaintiff does not contend that she received no mentoring, just that it was deficient.

On March 10, 1988, Plaintiff made her presentation at the journal club, which she thought went very well and on which she received positive feedback from some of the physicians. The next day, during a discussion with Dr. Rubinow, she claims he began a two-hour harangue about how she had treated him during the presentation. More criticism allegedly followed, including statements that people did not like her because she was "competent and attractive" rather than being more dependent on Dr. Rubinow. She also claims that Dr. Rubinow told her she must go into psychotherapy if she wanted to succeed at NIMH and gave her three names of therapists.[8] Plaintiff eventually saw Dr. Earle Silber, one of those recommended.

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[8] This alleged event is not separately actionable, but evidence was presented in the context of the claim of denial of overall mentoring.

Dr. Rubinow, on the other hand, testified that he thought Plaintiff's journal club presentation was very bad. He had asked her to make the presentation to him first to practice, but she did not do that. Her presentation was not well-organized, did not identify the questions she attempted to answer, was anecdotal, and lacked cohesion. He felt it was impossible for someone to listen to the presentation and conclude it was other than a mess. He was concerned both that Plaintiff had not reviewed the presentation with him before--no one else, before or since, has failed to do so-and that Plaintiff's poor showing did a disservice to PMS research that was largely denigrated in the field and sorely needed help to be considered important and credible. He even sought advice from Dr. Post to see if his view was shared. Dr. Rubinow shared his view with Plaintiff. He began by stating the things that were good and then made suggestions based on the problems he saw. Plaintiff became tearful and recounted again her experiences with her father when he refused to support her. Dr. Rubinow expressed concern that because of her prior unfavorable experiences with men, she might come to see him as abusive, and he wanted to see that Plaintiff had a successful fellowship. He recommended that she resume psychotherapy. When Plaintiff expressed curiosity in pursuing the idea, and asked for recommendations, Dr. Rubinow gave her three names. Again, Dr. Rubinow denied yelling at Plaintiff or using the words "entitled, narcissistic, demanding, competent or attractive." It was Plaintiff who said she could not understand why people were jealous of her as she was still in her residency and had few publications. She said her friends told her she was too competent 11 and attractive and that was why she was not liked. Dr. Rubinow assured Plaintiff that the others were not jealous of her.

The next session with Dr. Rubinow was on March 25. Plaintiff wanted to discuss the prior session, an event Dr. Rubinow considered unimportant. After that session, Plaintiff says she changed her appearance by wearing a lab coat at all times and her attitude in that she stopped stating her own opinion. In the Summer of 1988, Plaintiff received the normal salary increases due to promotion to a second-year fellow and an across the board increase. There was nothing significant in this raise.

Plaintiff began pursuit of an EEO complaint in November 1988. At the November 18 supervision session, Plaintiff testified that she and Dr. Rubinow began discussing why she was feeling

relatively better since the March "blowup." The discourse escalated, however, into an analysis by Dr. Rubinow of Plaintiff Is problems, including labeling her as abused, and ended with a threat. Later in her to testimony, Plaintiff said the quality of the mentoring remained the same afterwards, meaning she saw no improvement.

The interaction with plaintiff on November 18, 1988 was a shock to Dr. Rubinow. Plaintiff said she wanted to participate in meetings about PMS ideas. He replied that all meetings surround data and there are no other meetings. He did not know where Plaintiff got the idea. Plaintiff then said she wanted to discuss the various ways he had abused her. He asked what she meant. She replied: insisting she go into psychological counseling, by calling her competent and attractive, by expressing concern that her discussion of abuse by her father with her supervisor implied it was the victim's fault. Plaintiff believed the abuse was based on gender. He said he tried to deal with all of Plaintiff's statements in turn. He only later learned of Plaintiff Is EEO complaint. In his view, nothing changed. They continued to meet regularly, and he continued to assist with her projects.

As noted at the outset of this opinion, Title VII cannot promise an ideal working relationship, even when mentoring is part of it. The difficulties experienced by Plaintiff do not rise to the level of being deprived of mentoring. She participated in the work of the lab and had the opportunity to learn from the senior scientist. The unfortunate fact that they did not communicate better, or that they differed in their views of the relationship, does not mean that Plaintiff was denied an aspect of the fellowship.

Third Year and Guest Researcher Position

Plaintiff testified that she approached Dr. Rubinow about a third year of the fellowship in the Summer of 1988. Dr. Rubinow allegedly told her that he would not give her a third year, that he had decided in January 1988 that she would not stay because another fellow was scheduled to arrive in 1991, so he needed another two year fellow in between. He told her that there were other ways to complete her projects and that this decision was not based on her work. Plaintiff claims she understood at the time that she could stay on in some other capacity.

Dr. Rubinow recalls that just after his vacation in the Summer of 1988, he brought up the subject of the end of her

fellowship the next summer. He wanted to be sure Plaintiff knew she had ten months to finish her projects. Plaintiff said she wanted a third year and became tearful, lamenting that she felt like a failure. Dr. Rubinow told her not to feel that way, that the fellowship was for two years, sufficient to provide training so the fellow could
go out and do research. He told her that the fellow who would follow her would also be a two-year fellow because Dr. Rosenstein, who had been there as a medical student in 1986 and was to return, was already scheduled to arrive in 1991. As of September 1988, he did not have anything arranged for a new fellow in July 1989. Dr. Su, who eventually arrived after Plaintiff Is departure in 1989, was not interviewed until April 1989. Dr. Rubinow recalls no discussion with Plaintiff at that time about her staying on in another capacity and denies telling her he had changed his mind about her third year. He wanted Plaintiff to produce at least one publishable manuscript and to collect data for all her projects so she could write them up after she left.

In the Fall of 1988, Plaintiff claims that she mentioned to Dr. Rubinow that she thought her own studies were undervalued. She said that he agreed, a remark categorically denied by Dr. Rubinow in his testimony. This instance was the first time it became clear to Plaintiff that she would have no opportunity to complete her studies with Dr. Rubinow after July 1989. She began inquiring with other researchers. She said Dr. Post turned down her request because he had to work with Dr. Rubinow. Dr. Putnam said he would take Plaintiff but did not have a slot available. He would allow her to be a guest researcher if she did not find another position. A couple of weeks later, Dr. Putnam advised her that Dr.- Brown had a position available in child psychology and Plaintiff should apply. Plaintiff did and interviewed with Dr. Brown. Things went well until Dr. Brown asked how things went with Dr. Rubinow and Plaintiff mentioned the EEOC. He then said it would be too dangerous to take her on because of her EEO complaint against the clinical director. Dr. Gerald L. Brown denies that the discussion occurred that way.. Instead, he says he discussed the fellowship with Plaintiff in December 1988. Dr. Brown asked her to call him if she was available. He never heard from her.

Dr. Rubinow testified that., in February 1989, Plaintiff told him she wanted to be a guest researcher and listed projects she wanted to continue. Dr. Rubinow said he was not sure and asked

that Plaintiff provide a written statement of exactly what she wanted to accomplish. He eventually received the list approximately June 16 stating publications Plaintiff felt she should be first co-author on, continued access to secretarial help and the lab, weekly meetings with Dr. Rubinow, library privileges, and computer access. Dr. Rubinow did not give Plaintiff a formal guest researcher position, but agreed to meet with her whenever necessary for data analysis or preparation of a paper. She also could have access to secretaries, the lab, and the computer during day time.[9]

Plaintiff eventually sought to be a guest researcher with Dr. Putnam. Dr. Rubinow played no role whatsoever in Plaintiff's application to be a guest researcher with Dr. Putnam and did not learn of it until November 1989. She asserts, nevertheless, that the processing of her application to be a guest researcher was adversely affected by discrimination. Once again, there is no legitimate support for this belief.

Hazel W. Rea began her employment at NIH in 1949. After "retirement" in 1981, she continued as a reemployed annuitant working half-time. over the years, her responsibilities increased and she handled the administrative paper work for Plaintiff's request to be a guest researcher in 1989. She recalled getting the investigator's application which Plaintiff had signed on July 17, 1989, and calling Dr. Yarrow who was listed as the person for whom Plaintiff would work. He referred Ms. Rea to Dr. Putnam, whom she called next. She inquired why Plaintiff would want to come back and work for someone else gratuitously after she had completed a paid fellowship. At the time, Ms. Rea did not know Plaintiff personally, although she knew her name nor did she know anything about her EEO complaint. According to her, Dr. Putnam said he had checked with Dr. Rubinow and Plaintiff's period as a, guest researcher would pose no problem. She approved the position by signing the paperwork on August 17, 1989. She denied making any threats or issuing any warnings - in connection with the guest researcher position.

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[9] After Plaintiff's fellowship ended he provided her with recommendations on how to analyze and present data on the clonidine study, how to analyze and interpret the second clonidine study, and he had assays performed at NIMH expense. He had no formal obligation to continue to help Plaintiff, but the data was no good unless brought to public attention; he thought the data was worthy of that attention and wanted to see Plaintiff be able to produce publications.

Dr. Putnam, too, denies anything untoward happened during the process. In the Spring or 1989, Plaintiff told Dr. Putnam that she was not going to be extended for a third year. He told Plaintiff that, if she could get permission to continue to see patients, she could have a guest researcher position with him. Dr. Putnam did not discuss Plaintiff with Dr. Rubinow at that point. In order to sign up a guest researcher, he had to obtain several signatures. (Plaintiff's Exhibit No. 71a). Dr. Putnam recalls a conversation with Hazel Rea, who asked whether he knew that there had been trouble with Plaintiff. He responded that he felt he could help Plaintiff and that he wanted her as a guest researcher. Ms. Rea said "fine." The papers were signed. He did not feel threatened or warned and denied saying to Plaintiff that any threats or warnings were issued.

Plaintiff was able to stay on as a guest researcher, but her official employment ended on July 12, 1989. The later events might have some relevance in assessing whether any adverse employment actions occurred during her fellowship. It is not necessary, however, to delineate the evidence in detail.[10]

Dr. Rubinow never said during Plaintiff's employment that she could not have access to him or resources to complete her

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[10] According to Dr. Putnam, he arranged to meet with Plaintiff regularly to schedule patients and to go over data. In reality, he met with Plaintiff only a few times in July, August, and September, and only once in October when Plaintiff stopped coming until April 1990. In the interim, some meetings were scheduled, but canceled his view, by Plaintiff. In his efforts to teach Plaintiff how to put data together into usable format met with only limited success. At the meeting in April 1990, he received notes outlining what Plaintiff intended to do for two papers. He never received a draft paper from Plaintiff during her guest research position. No draft was received from July 1990 to December 1991.

At a conference in Chicago in October or November 1989, Plaintiff presented an abstract on the trauma study. Dr. Putnam sat in and critiqued her performance afterwards. He thought she had problems listening to questions from the audience. He denied being unavailable to Plaintiff for any length of time during the guest researcher time and could always schedule time to meet. Near the end of the -year, Plaintiff asked for a renewal. He declined because there were a limited number of guest researcher positions and he had not accomplished any of her goals; there was no evidence of increased productivity.

projects. While he never agreed to afford her a formal guest researcher position, he was not really given the appropriate chance to do so. She did not submit the written information until very late in her stay, and Dr. Rubinow did not think that her plans necessitated a formal position. Furthermore, Dr. Rubinow did not interfere in any way in Plaintiff's discussions with others concerning other positions. The opportunity to stay on at NIMH, in a position other than as a medical staff fellow or as a guest researcher, remains an amorphous issue. Plaintiff certainly did not prove that such opportunities were benefits of employment, or that an opportunity was withheld from her on a discriminatory or retaliatory basis.

CONCLUSION

When the smoke clears from the years of litigation and animosity, it is easy to see that Plaintiff's claims lack substance. Given the current scope of Title VII, the only issues properly before the court is whether Plaintiff was denied mentoring or any benefit of employment as a part of her medical staff fellowship from July 1987 to July 1989 as a result of gender discrimination or retaliation. For the reasons stated above, she has not proven that she was denied mentoring, or that any other employment actions were either benefits of employment or denied to her because of intentional gender discrimination or retaliation. It follows that judgment will be entered in favor of Defendant and against Plaintiff on all claims.

s/ Deborah K. Chasanow
DEBORAH K. CHASANOW
United States District Judge

March 28, 1996

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARGARET JENSVOLD, M.D.

v.

Civil Action No.
DKC-90-3123

DONNA E. SHALALA,
SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES

VERDICT SHEET

I. Do you find that any of the following were included as benefits of employment as a medical staff fellow?

A. Mentoring

Yes	No
X	

B. Opportunity *to Stay* at NIMH in a capacity Other Than as a Medical Staff Fellow After the Second Year.

Yes	No
X	

C. Guest Researcher Position with Dr. Rubinow.

Yes	No
X	

D. Impartial consideration for a Guest Researcher Position with Dr. *Putnam.*

Yes	No
X	

E. Opportunity to Contact Patients After July 12, 1989.

X
Yes No

F. Analysis of Blood Samples After July 12, 1989.

X
Yes No

G. Inclusion as Co-Author After July 12, 1989.

X
Yes No

II. For any of the foregoing that you found to be benefits of employment, do you find that Plaintiff suffered adverse employment action with respect to each? (Only respond with respect to those items marked "yes" in No. 1.)

A. Mentoring.

X
Yes No

B. Opportunity to Stay at NIMH in a Capacity other Than as a Medical Staff Fellow After the Second Year.

X
Yes No

C. Guest Researcher Position with Dr. Rubinow.

X
Yes No

D. Impartial consideration for a Guest Researcher Position with Dr. Putnam.

X
Yes No

E. Opportunity to Contact Patients After July 12, 1989.

X
Yes No

F. Analysis of Blood Samples After July 12, 1989.

X
Yes No

G. Inclusion as Co-Author After July 12, 1989.

X
Yes No

If you have answered "no" or left blank all of No. II, stop and leave the remainder of this form blank. If you have answered "yes" to any part of No. II, answer remaining questions.

III. GENDER DISCRIMINATION

With respect to the items in II.A or B marked "yes", answer III.A and/or B on this page.

A. Do you find that Defendant intentionally discriminated against Plaintiff on the basis of gender with respect to mentoring on or after October 15, 1988?

X
Yes No

B. Do you find that Defendant intentionally discriminated against Plaintiff on the basis of gender with respect to the opportunity to stay on at NIMH in a capacity other than as a medical staff fellow after the second year between October 15 and November 15, 1988?

Yes No

If you answered "yes" to either of the questions above on this page, respond to question C below.

C. Do you find that gender discrimination caused damage to Plaintiff's professional reputation?

X
Yes No

IV. RETALIATION

A. With respect to those items in II, C, D, E, F, or G marked "yes", do you find that Defendant intentionally discriminated against Plaintiff in retaliation for filing the EEO complaint?

1. Guest Researcher Position with Dr. Rubinow.

X
Yes No

2. Impartial consideration for a Guest Researcher Position with Dr. Putnam.

Yes No

3. Opportunity to Contact Patients After July 12, 1989.

Yes No

4. Analysis of Blood Samples After July 12, 1989.

X
Yes No

5. Inclusion as Co-Author After July 12, 1989.

X
Yes No

If you answered "yes" to any of the questions above on this page, respond to question B below.

B. Do you find that the retaliation caused damage to Plaintiff's professional reputation?

X
Yes No

V. DAMAGES

If you have answered "yes" to either III.C or IV.B, what amount do you assess as damage for injury to professional reputation?

X
$1.00 or $_____

s/ John Schmidt
FOREPERSON

4/1/94
DATE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 27, 1998

No. 96-1964
CA-90-3123-DKC

MARGARET JENSVOLD, M.D.

Plaintiff - Appellant

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

Defendant - Appellee

By order dated May 4, 1998, the clerk denied appellant's motion for an extension of time within which to file a petition for rehearing with suggestion for rehearing en banc. The appellant has filed a motion for reconsideration of the clerk's order, a motion for stay pending ruling on the motion for reconsideration, a petition for rehearing, and a suggestion for rehearing en banc.

Judges Phillips, Murnaghan, and Ervin voted to deny the petition for rehearing.

No member of the Court requested a poll on the suggestion for rehearing en banc.

The Court denies the petition for rehearing with suggestion for rehearing en banc, and denies appellant's motions for reconsideration and for stay as moot.

Entered at the direction of Judge Phillips for the Court.

For the Court,
/s/ Patricia S. Connor
CLERK

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

June 4, 1998
No. 96-1964
CA-90-3123-DKC

Jensvold v. Shalala, Sec

MANDATE

The judgment of this Court dated 3/30/98 takes effect today.

PATRICIA S. CONNOR
CLERK